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Extraterritoriality and Human Rights: Time for a Change in the U.S. View?

By **Peter Margulies** Saturday, March 8, 2014, 8:11 AM

As Jack has frequently observed, legitimacy and effectiveness often go hand-in-hand. The two comprehensive State Department memoranda by former Legal Adviser (and Yale Law School dean) Harold Koh released Friday on extraterritoriality under the ICCPR and Convention Against Torture make this point powerfully and persuasively (see commentary by Marko Milanovic [here](#) and Jennifer Daskal [here](#)). Although it seems like the US will persist in arguing to the contrary (see the summary by Wells [here](#)), it's time for a change, as I urge in my recent Fordham article on extraterritoriality and the NSA.

Dean Koh's ICCPR memo, which I focus on here, first deconstructs the textual point that best supports the current US position. Article 2(1) of the ICCPR binds states parties to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized... in the Covenant." The US, since the Clinton administration, has interpreted the terms, "within its territory and subject to its jurisdiction," as conjunctive, meaning the US does not assume duties under the treaty unless an individual is within its territory. However, Dean Koh points out that ordinary rules of textual interpretation do not dictate this view. First, Dean Koh points out that the US reading makes the verb, "respect," redundant. The term, "respect," commits a state to refrain itself from violations. The term, "ensure," in contrast, entails sweeping affirmative duties to guarantee rights against incursions by others. Since "ensure" is a far broader term, it already encompasses the narrower duty to "respect" rights. Expressly mentioning the duty to "respect" would therefore be unnecessary. We generally assume that the drafters of a treaty, statute, or constitution did not intend mere surplusage – the words used are supposed to mean something. The US reading violates this basic tenet.

Dean Koh, practicing the lawyer's trademark skill at close reading, also notes that the US position violates the rules of grammar. Under the US view, a state party must "respect... to all individuals within its territory and subject to its jurisdiction" the rights listed in the treaty. Focus on the phrase, "respect... to all individuals." In English, French, and the other major treaty languages, we don't "respect" rights "to" rights holders. We might respect rights "owed to" rights holders. However, that adds another word, something that the US claims its reading avoids. Since we assume that treaty drafters don't celebrate bad grammar, the need to endure bad grammar or add a word to correct it renders the US stance suspect.

Dean Koh also restores Eleanor Roosevelt to her proper place in the ICCPR's drafting history. The US has glibly invoked the memory of Roosevelt, a principal drafter of the ICCPR, to buttress its narrow reading of the treaty. Dean Koh, in a definitive reading of the ICCPR's travaux préparatoires, confirms that Roosevelt sought a narrow construction in only one situation: sparing the U.S. from enacting legislation after World War II to "guarantee" the rights of individuals within Germany and Japan against the depredations of their own governments. In other context, Roosevelt acknowledged the responsibilities of the US and other states parties. Any other stance, as Dean Koh observes, would have been incongruous, given Roosevelt's insistence that the universality of human rights was a principal bulwark against brutality and despotism.

Finally, Dean Koh notes that the current US stance is an unforced error. Even if the ICCPR applied extraterritorially, US drone and detention operations abroad would be governed by the more specific law of armed conflict (LOAC), under the well-known *lex specialis* doctrine. Since, as Dean Koh informed the American Society of International Law in 2010, the US follows LOAC (a point seconded by Mike Schmitt [here](#)), we are better served by joining the contest on that ground. Avoiding a debate on the merits awards the high ground to those who claim the US cannot mount an effective substantive defense of its choices. That perception does not serve the law or American interests.

Topics: Relationship between LOAC and IHRL, International Law, Extraterritoriality, NIAC: Conflict with IHRL, Non-International Armed Conflict

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